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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-507

WILFRED KEYES, ET AL., PETITIONERS

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c-6, 2000d, and 2000h-2 in the area of school desegregation. The appearance here as *amicus* is consistent with the government's participation in such cases as *Brown* v. *Board of Education*, 347 U.S. 483; *Brown* v. *Board of Education*, 349 U.S. 294; *Cooper* v. *Aaron*, 358 U.S. 1; *Goss* v. *Board of Education*, 373 U.S. 683; *Green* v. *School Board of New Kent County*, 391 U.S. 430; *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Swann* v. *Board of Education*, 402 U.S. 1.[1] While the govern-

[1] The United States has participated in every school desegregation case which this Court has heard on the merits since *Brown I. Rogers* v. *Paul*, 382 U.S. 198, and *Bradley* v. *School Board*, 382 U.S. 103, in which the government did not participate, were decided on the petitions for certiorari.

ment did not participate in this case in the courts below, the issues presented are related to those presented in cases where the government is a party. Thus, the outcome of this case will affect the government's enforcement responsibilities under federal law, especially in cases against school districts where racial segregation has not been compelled by state statute.

STATEMENT

The procedural history and the decisions of the courts below are summarized in the briefs of the parties. The Denver school district serves an area of 100 square miles and operates about 120 schools. Of its 100,000 pupils, 14 percent are black and 20 percent are Hispano.

The evidence before the district court was, broadly speaking, two-fold. First, evidence was presented concerning actions by school officials that allegedly contributed to the racially and ethnically segregated character of some predominantly black or Hispano schools in the system. This evidence related to such matters as construction policies and practices, assignment of faculty, and creation of attendance zones.

Second, evidence was presented comparing other predominantly minority schools in the system with certain predominantly Anglo schools, in terms of such characteristics as faculty experience and turnover, school facilities including site size, and achievement as measured on standard aptitude tests.

INTRODUCTION AND SUMMARY

This case presents for the first time in this Court questions involving the application of the equal pro-

tection clause in the context of racial and ethnic concentration in a northern urban school system with no history of compulsory segregation.

The record sets forth a pattern familiar to many urban areas—a basic neighborhood school system; a well-defined "core area" populated predominantly by black or ethnic minorities; a gradual expansion of this area into surrounding neighborhoods accompanied by an increasing number of predominantly minority schools; and significant evidence of sub par educational success in such schools.

Both below and in this Court, the parties have urged one-dimensional application of the equal protection clause. The plaintiffs contend that official acts of invidious racial discrimination have been widespread and continuous and require system-wide desegregation relief; the defendants argue that racial and ethnic impaction in the schools is primarily a function of residential patterns and that any official acts found in retrospect to have been racially motivated should be viewed as remote and insignificant causes of the present problems.

We agree with the courts below that there are at least two discrete applications of the equal protection clause to this factual pattern. First, both the district court and the court of appeals found that with respect to some of the schools in the neighborhoods that changed from Anglo to black or Hispano, the school board took official steps that deliberately caused or promoted minority concentrations. Such acts of *de jure* segregation violate the equal protection clause

and, under the decisions of this Court, must be remedied promptly and effectively.

Second, with respect to the original core area schools, both courts found that the petitioners had not presented sufficient evidence to show that the minority concentrations were related to official school board acts; the record supports that finding as to most core area schools. However, there was some evidence that the school district allocated disproportionately less of its resources to such schools and that by some of the standard measurements a poorer quality of education was delivered. The district court found in these "input" and "output" disparities a constitutional violation which it chose to remedy by eliminating the racial concentration. The court of appeals, however, found the apparently inferior education to be causally remote from the disproportionate allocation of resources and therefore considered it only an educational, and not a constitutional problem.

As explained more fully below, we concur generally with the district court's legal analysis, but believe that the relief ordered was beyond that required to remedy the violation. Under familiar principles, we therefore suggest a remand to define more precisely the nature of the violation and to design appropriate relief in this phase of the case.

DISCUSSION

We discuss here, in terms of the record in this case, both the standards that we believe should be applied in determining whether there has been presented a *prima facie* case of unconstitutional segregation of

public schools and unconstitutional denial of an equal educational opportunity, and the facts that we believe constitute a defense to each such *prima facie* showing.

I. STANDARDS FOR DETERMINING WHETHER THERE HAS BEEN AN UNCONSTITUTIONAL SEGREGATION OF PUBLIC SCHOOLS

We begin with the premise that the existence of racial or ethnic imbalance in public schools does not, by itself, constitute a *prima facie* case of unconstitutional segregation of public schools. *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D.N.J.), affirmed, 404 U.S. 1027. We also assume that the intentional segregation of students in public schools on the basis of race or national origin is *per se* an invidious racial or ethnic classification that cannot be justified by benign motives and is therefore unconstitutional. *Brown I*. While an absolute rule based solely on segregative results or, conversely, requiring in every case proof of discriminatory motive might be easy to apply, the former would, in our view, go beyond the requirements of the Fourteenth Amendment and the latter would mistakenly permit an agent of the state to segregate students by race or national origin so long as his motive is benign. See *Wright* v. *Council of the City of Emporia*, 407 U.S. 451; *Buchanan* v. *Warley*, 245 U.S. 60. The proper test requires a more sophisticated scrutiny of the facts to determine whether state officials have intentionally acted to create a racial or ethnic classification and whether the classification is an invidious one; it does not require a probing of the subjective motives of those state officials.

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1. *State action.* The first requisite to invoking the equal protection clause is that the classification be created by state action. *Ex parte Virginia*, 100 U.S. 339. The courts below agreed that, as stated by the court of appeals, "state imposed segregation of the sort condemned in *Brown* should [not] be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers" (Pet. App. 134a). Since student and teacher assignments, building locations, and other aspects of school operation are controlled by the school board, the existence of state action is clear. The principal inquiry, therefore, is whether the state action is a racial classification.

2. *Racial or ethnic classification.* The respondents contend that at least until 1964 the Denver school officials consistently made their decisions affecting student assignments on the basis of a neutral neighborhood school policy and without regard to race. If the record supported that proposition we believe the respondents would have a valid defense to a charge of unconstitutional segregation. For, in light of its common usage throughout the country[8] and the fact that it is in many ways the easiest and most logical system of student assignment, the neighborhood school should be presumptively nondiscriminatory.[9]

[8] Dr. Coleman testified that "most school systems organize their schools in relation to the residents by having fixed school districts and some of these are very ethnically homogeneous" (App. 1549a).

[9] The rule stated by the court of appeals was: "* * * neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the results of such plans is racial imbalance" (Pet. App. 134a).

The record does not reflect the racial residential patterns in School District No. 1 or the nature of the school operation when the neighborhood school structure was first adopted by the system. Consequently, there is no basis for a finding that the Denver school officials imposed a neighborhood school system *ab initio* on an existing pattern of residential segregation.[4] Compare *Cisneros* v. *Corpus Christi Independent School District*, C.A. 5, No. 71-2397, decided August 2, 1972 (*en banc*). On this record, therefore, the adoption of the neighborhood school policy cannot be said to have been racially discriminatory.

But the neighborhood served by a school is what the board chooses it to be, and we think the courts below were correct in saying that a neighborhood school system may not be manipulated to segregate students by race. In determining whether a neighborhood policy is being fairly applied, one must consider evidence about the size of the school buildings, their locations, the availability of transportation, natural and man-made barriers, and so forth. As this Court recognized in *Swann*, these are the factors "which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system." 402 U.S. at 20.

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[4] The evidence related almost exclusively to actions of school officials since 1950. While the record shows that at that time blacks were concentrated in the "Five Points" area (Pet. App. 4a), nothing in the record discloses how that situation occurred, or whether choices in school construction, attendance zone boundaries, and the like may have influenced the pattern of school attendance.

What is required, then, is a factual analysis of the causes of the segregation at each school to determine whether it is the result of intentional segregative action by the school authorities. The factual burden falls initially on the plaintiffs, who must show that the disparate racial or ethnic effect of the school authorities' action is related to a historical pattern or other circumstances showing explicit considerations of race or from which race-consciousness might be inferred. Here, such evidence was offered as to some schools, such as Manual High and the Park Hill schools,[6] but the record is silent as to others, such as the predominantly Hispano schools.

When the plaintiffs' burden has been met, as in the case of some schools here, the school officials may rebut the resulting presumption of racial discrimination by showing that they had no knowledge of the racial effect and that such effect was wholly fortuitous. *Jefferson* v. *Hackney*, 406 U.S. 535, 547. Or they may, besides factually disputing any evidence presented by the plaintiff, show that a variation from established policy was justified by a compelling circumstance or that available alternatives would not have changed the racial effect or were not feasible, or they may make some other showing that negates the

[6] In addition to racial statistics, there was evidence that Manual was planned as a heavily minority school. As to Manual and Park Hill there was evidence of deviations from normal school board policy, including a pattern of construction, boundary line changes, rejection of non-segregative options, and segregated faculty assignments.

basis of the presumption. But the thrust of the inquiry should be the objective intent of state officials, not their subjective motives.[6]

Here, the respondent school officials denied that any of their decisions or actions were made with an intention to segregate students or to assign faculty on the basis of race. They disputed the factual accuracy of some of the evidence presented by the petititoners, and they attempted to rebut any presumption of discrimination by showing that their action was consistent with established practices or that any variance from usual policies was based on other educational considerations.[7] The respondents' evidence varied from general disclaimers of any racial purpose to evidence which purported to justify, on educational grounds, actions which had a known racial effect.

In evaluating the evidence concerning "the special circumstances surrounding * * * particular schools" (Pet. App. 21a), the courts below appear to have applied a proper standard to the Park Hill area schools. For example, in determining that Barrett was uncon-

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[6] Thus, a judge should not be asked to determine whether racial considerations or other considerations were the "dominant purpose" underlying school officials' decisions. *Wright* v. *Council of the City of Emporia*, *supra*, 407 U.S. at 462; *Palmer* v. *Thompson*, 403 U.S. 217, 225.

[7] For example, to rebut the implications of evidence that optional zones were employed by Anglo students to avoid attending predominantly minority schools, the respondents presented evidence that the use of optional zones was a standard practice in the school system (App. 827a–857a). To justify the transportation of Anglo students past apparently under-utilized predominantly minority schools to Anglo schools, the respondents contended that the actual capacity of predominantly minority schools could not be measured by the usual standard

stitutionally segregated when it was opened, the district court considered the unusually small size of the school, its location and zone boundaries in light of the established board policies, the severity of the racial effect, the school officials' knowledge of the probable racial effect, the racial pattern of faculty assignments, and the alternatives available to the board (Pet. App. 5a, 21a–23a), and it considered and rejected the respondents' proffered justifications (Pet. App. 48a–49a). The court of appeals affirmed, concluding that there was "sufficient evidence to support segregative intent" (Pet. App. 135a). Concerning the construction of new Manual and the alterations of the mandatory Cole-Manual attendance zone,[8] the courts reached the opposite result, without examining in detail whether a *prima facie* case had been made out or rebutted. We think it is error to fail to make a detailed analysis of the evidence presented in determining whether a school is *de facto* or *de jure* segregated.[9]

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applied in the school system because the classroom size in those schools was reduced for educational reasons in order to lower the pupil-teacher ratio (Br. 20–21).

[8] The racial considerations underlying the construction of new Manual were explicit and the concentration of black high school students in that school was severe: 541 of the 641 black high school students in the district were enrolled in new Manual in its first year of operation (Br. 23).

[9] The district court said that pre-*Brown* "it was apparently taken for granted by everybody that the status quo, as far as the Negroes were concerned, should not be disturbed because this was the desire of the majority of the community" (Pet. App. 67a), and that the actions were not "wilful or malicious" (Pet. App. 68a–67a). It is thus unclear whether the reason for failing to explore the evidence as to these schools more fully was that the court excused the segregative effects of those race-

Cf. *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55 (C. A. 6).

3. *Segregative effect.* The purpose of injunctive relief, of course, is to remedy present violations, not to punish for past sins. The district court therefore inquired whether there was "a causal connection between the acts of the school administration complained of and the current condition of segregation" (Pet. App. 68a). However, it appears, at least as to Manual High School, that the court placed the burden of proof as to causal connection upon the plaintiffs. This Court has held that where a plaintiff has shown that state action caused unconstitutional segregation in the past, the burden is on the school officials to establish that the present segregated condition of schools affected by such action "is not the result of present or past discriminatory action on their part." *Swann* v. *Board of Education*, *supra*, 402 U.S. at 26. We see no reason why that rule should not apply as well where the segregation was caused by deliberate school board action.[10]

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conscious decisions on the ground that the motives of the board were benign. Such an approach would be inconsistent with previous decisions of this Court. See, *e.g.*, *Buchanan* v. *Warley*, 245 U.S. 60; *Cooper* v. *Aaron*, 358 U.S. 1; *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713.

[10] Of course, the rule applies only to schools as to which it has been shown that state action caused unconstitutional segregation. It does not apply to some other school in the system as to which it has been shown only that the student body is racially or ethnically imbalanced. In light of the general knowledge and judicial recognition of the effects of school construction and like decisions on residential patterns (see *Swann*, *supra*, 402 U.S. at 20-21), it is not an unreasonable burden to require the respondents, insofar as they relied upon racial shifts in

II. STANDARDS FOR DETERMINING WHETHER THERE HAS BEEN A DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY

In ascertaining whether school authorities have unlawfully discriminated on the basis of race or national origin by providing Negroes and Hispanos inferior facilities, faculties, or instructional programs, the courts again must also determine the existence of state action, of an invidious racial classification, and of a present discriminatory effect. Two types of evidence relating to unequal education were presented in this case: evidence about objectively measurable resources allocated to the various schools in the system (teacher experience and turnover, site size, age of buildings), and evidence of a more indirect nature about the quality of the educational program in the various schools (achievement test scores, drop-out rates, testimony of educators and parents). Perhaps because of the theories upon which the case was tried, neither kind of evidence was fully developed below.

1. *Objectively measurable resources.* The justiciability of allegations that equal educational opportunities have been denied could depend on whether the evidence necessary to support the allegations can be analyzed in terms of judicially discoverable and manageable standards for determining a violation and devising a remedy. See *Baker* v. *Carr*, 369 U.S. 186, 217. In this respect, a disparity in the allocation of objectively measurable resources may stand on a firmer

residential populations, to demonstrate that their segregative actions were not a cause of the residential segregation.

footing than more indirect evidence of the quality of education.[11]

The courts below agreed that with respect to at least one objectively measurable aspect—teacher experience—there was a disparity between predominantly Anglo schools and predominantly Negro/Hispano schools (Pet. App. 80a–82a, 143a–144a).[12] Instead of viewing such disparities as discrete violations, however, the courts below appear to have viewed them as evidence to be considered in determining whether minority group children were being denied an equal educational opportunity.[13]

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[11] For example, in *Swann*, *supra*, this Court said (402 U.S. at 18–19):

> Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown. * * * In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs.

The court of appeals appears to have expressed the same notion this way (Pet. App. 143a):

> If we allow the consignment of minority races to separate schools, the minimum the Constitution will tolerate is that from their objectively measurable aspects, these schools must be conducted on a basis of real equality, at least until any inequalities are adequately justified.

The court of appeals said this was "but a restatement" of *Brown* v. *Board of Education*, 347 U.S. 483, 493. See, also, the district court's opinion (Pet. App. 88a–89a).

[12] The district court also found a disparity in facilities but considered it of only marginal importance (Pet. App. 83a).

[13] As the court of appeals stated: "* * * we cannot conclude from that one factor—as indeed neither could the trial court—that inferior schooling is being offered" (Pet. App. 144a).

We think it would be inappropriate to adopt an all-or-nothing approach under which a school system can justify a disparity in objectively measurable educational inputs by showing, for example, that "it is not the proffered objective indicia of inferiority which causes the substandard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs" (Pet. App. 144a). The causes of substandard academic performance are too conjectural to be made the central issue in desegregation suits; and in any event substandard performance is not the only effect of inadequate schooling.

Where the state provides inferior resources to predominantly Negro/Hispano schools, there is state action; in the absence of a legitimate non-racial reason for the disparity, there is a racial classification; the present discriminatory effect is simply that minority group students are receiving inferior resources for their education, and nothing further in the way of proof about educational consequences should be necessary to show that this is a basic unfairness.

2. *Output as a measure of equal education.* The district court's findings that scholastic achievement and student drop-out rates were worse at heavily Negro or Hispano schools (Pet. App. 78a–80a, 82a–83a) are fully supported by the record, and the court of appeals seems to have accepted them (*e.g.*, Pet. App. 144a). Thus, there appear to be objectively measurable disparities reflecting that the educational goals of the Denver public school system are less fully realized in the heavily Negro or Hispano schools. The difficulty

arises in determining whether that failure is the result of unconstitutional state action and, if so, in devising an appropriate remedy.

The school system urged, in effect, that the output disparities are not caused by state action or, if they are, that the action was not discriminatory as to blacks and Hispanos. It thus offered at least three explanations: (1) the low scores and high drop-out rates are the result of non-school-related factors; (2) some Anglo schools have similarly low achievement score medians; (3) the low scores correlate more closely with socioeconomic status than with race or national origin. A fourth question might be whether achievement scores are accurate indicators of the success of the educational program.

The district court found that the principal cause of the output disparities was "the enforced isolation imposed in the name of neighborhood schools and housing patterns" (Pet. App. 89a). The court of appeals said "[w]e cannot dispute the welter of evidence offered in the instant case and recited in the opinions of other cases that segregation in fact may create an inferior educational atmosphere" (Pet. App. 145a); it reversed, however, because "the trial court's findings stand or fall on the power of federal courts to resolve educational difficulties arising from circumstances outside the ambit of state action" (Pet. App. 144a). Thus, while the courts below seem to agree that the quality of a student's education depends in part on who his classmates are, the court of appeals found the district court inconsistent in ruling, on the one hand, that the school system had not discriminatorily segre-

gated the students in particular schools but, on the other hand, that the school system had discriminatorily provided inferior input for those schools by assigning a segregated student body to them.

But the issue, as perceived by the district court, was not whether the segregation was illegal but whether the school board had denied Negro and Hispano students equal protection of the laws by providing an educational environment in which the median achievement level of the students was predictably lower than in other schools. The board offered children in these allegedly *de facto* segregated schools what the court of appeals called "a curriculum which is allegedly not tailored to their educational and social needs" (Pet. App. 144a). The court of appeals appears to have assumed that because the school system may have treated the *de facto* segregated schools roughly the same as the predominantly Anglo schools, there could be no denial of equal protection.[11]

Like treatment of the two groups of schools would appear analogous to "the fabled offer of milk to the stork and the fox." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431.[12] We think that when this Court said in

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[11] As the district court said in its opinion on remedy (Pet App. 114a):

> * * * the underlying constitutional basis for [the March 21, 1970] decision * * * is that a state or its subdivision may not constitutionally maintain any program which treats members of minority groups unequally as compared with other groups. It makes no difference that the system may appear to be equal on its face, if its operation in fact results in unequal treatment. * * *

Brown I that state-provided education "must be made available to all on equal terms" (347 U.S. at 493) it meant that "the vessel in which the milk is proffered [must] be one all seekers can use." *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431. This means that where non-school-related factors produce differing educational needs among different racial and ethnic groups, the school system must seek to meet the needs of all groups equally.[15] If it fails to take adequate steps to meet these differing needs, the court may find that disparate achievement levels are school-related and caused by state action.[16]

The respondents pointed out below (*e.g.*, App. 568a) that although all predominantly minority group

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[15] As former Superintendent Oberholtzer testified (App. 1366a):

> There were differences in the curriculum within specific subject areas, to be sure, depending upon the needs of the pupils, their interests, and such. * * * This was related directly to that in an attempt to provide equality of opportunity.

See also *Schools, People & Money*, the Final Report of the President's Commission on School Finance (1972), p. 17:

> * * * the school is accountable if it fails to build upon a student's resources so as to enable him to make the most of whatever advantages he enjoys. Likewise, the school is at fault if it is insensitive to a student's handicaps or fails to give him the special help he needs to cope with them.

[16] In Denver, where in 1968 15.8 percent of the students were Hispano, the defendants might be constitutionally required to provide programs to meet special needs of Hispano students stemming from language or cultural differences. Cf. *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 525; *Meyer* v. *Nebraska*, 262 U.S. 390, 401. Also, compare *Cardona* v. *Power*, 384 U.S. 672, 675–677 (Douglas, J., dissenting), with *Katzenbach* v. *Morgan*, 384 U.S. 641, 659–664 (Harlan, J., dissenting).

schools have lower median achievement scores than the district-wide average, some predominantly Anglo schools scored lower than some of the predominantly minority group schools."[17] Respondents also point out that the experts testified that the low achievement was more closely correlated to socioeconomic status than to race (Br. 120–121). Such evidence is relevant to the question whether the inequality of opportunities is between racial or ethnic groups or between some other disfavored and favored classes.[18] The district court and court of appeals here held that the classification weighed most heavily on Negro and Hispano students, and the evidence appears to support that conclusion." Compare *Jefferson* v. *Hackney*, 406 U.S. 535.

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[17] For example, Plaintiffs' Exhibit 373 (App. 2090a) is a map designating the 30 elementary schools whose average achievement for the fifth grade in 1968 was below the 30th percentile. Four of those schools (Columbian, Sherman, Alameda, and College View) were majority Anglo in 1968 (Pl. Ex. 97, App. 2038a), and three of the predominantly minority schools affected by the district court's relief (Barrett, Hallett, Smith) ranked above the 30th percentile. Nine of the schools with achievement below the 30th percentile had enrollments between 30 and 50 percent Anglo and were therefore not classified as "minority schools" by either the district court or the petitioners (Remington, Smedley, Ashland, Eagleton, Evans, Monroe, Westwood, Elyria, Swansea). Two of these (Elyria and Smedley) subsequently fell below 30 percent Anglo and were therefore included in the relief.

[18] The plaintiffs have not claimed any unconstitutional economic classification, and that issue is not presented here. Cf. *San Antonio ISD* v. *Rodriguez*, No. 71–1332, this Term.

[19] See, *e.g.*, Pl. Ex. 376–R (App. 2096a), which shows that 13 percent of the Anglo students and over 60 percent of the Negro and Hispano students in 1968 were enrolled in schools that had average percentiles of below 30 on the fifth grade achievement tests. See, also, the Appendix to this memorandum, *infra*, pp. 25–26.

Apart from state action and racial classification, there is the question of the reliability of drop-out rates and achievement scores as measures of educational output. One difficulty is summarized in Mosteller and Moynihan's introduction to the recent restudy of the Coleman Report, *Equality of Educational Opportunity* (1966):[20]

> At the same time that we emphasize the importance of outputs, the reader must note that academic achievement is but one output, and that schooling is expected to produce many others. Retention rates, proportion going to college, income and occupation of graduates, even happiness, are a few of many outputs that might be measured. Although the EEOR studied academic achievement with some attention to self-image and self-esteem, the long-run implication of the EEOR is that outputs should be measured much more generally. Because the EEOR devotes so much space to academic achievement, the reader is likely to lose sight of that more general picture, since inevitably this book must often describe these variables both for EEOR and for the reanalysis. Lest it seem that academic achievement must be the only job of the schools, let us remember that studies do not find adult social achievement well predicted by academic achievement.

The Denver school authorities, however, have themselves relied upon drop-out rates and achievement scores as at least partial measurements of the success

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[20] Mosteller and Moynihan, *On Equality of Educational Opportunity* (1972), pp. 6–7.

of the school program,[21] and it is therefore appropriate to evaluate their actions in the light of evidence concerning those measurements. That evidence shows the existence of a school-related disparity in the achievement levels of children at minority group schools and Anglo schools. In these circumstances, we believe that the school board can meet its heavy burden of justifying its failure to eliminate the disparity by demonstrating that it is engaged in a concentrated, high priority, bona fide effort to meet the educational needs of the minority group students.[22] Although the defendants here presented testimony at the hearing on the merits relating to their efforts to meet the educational needs of all pupils,[23] it appears that the district court skipped over this step of the analysis and jumped directly from a finding of a school-related output disparity to a conclusion that the equal protection clause has been violated.[24]

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[21] See, *e.g.*, the testimony of the Denver Superintendent of Schools (App. 1777a) and Supervisor of Testing Services (App. 630a), and the system's report on old Manual High School (Pl. Ex. 356, App. 2086a, p. 6).

[22] The respondents argue that the low achievement test scores of most pupils in the predominantly Negro or Hispano schools were "in accordance with their capabilities as measured by the IQ tests" (Br. 117). Assuming the validity of such comparisons—as to which the record appears to be silent—this would not relieve respondents of the duty to develop and implement programs that attempt to deal with this difference between the characteristics of the minority group and Anglo schools.

[23] See, *e.g.*, the testimony of former Superintendent Oberholtzer (App. 1366a), quoted in note 21, *supra*.

[24] The district court did state, in a section headed "Discussion of Remedies," that "the remedial or special education pro-

III. STANDARDS FOR FASHIONING AN APPROPRIATE REMEDY

Both of the courts below found that the Denver school board had through official acts substantially contributed to the racial concentration of black students in the Park Hill area schools. This finding is supported by the record and should not be disturbed. The relief ordered by the district court and approved by the court of appeals was the implementation of the corrective program adopted and subsequently rescinded by the school board. Under the circumstances of this case we believe that these steps "promise realistically to work *now*," and are therefore appropriate. *Green* v. *School Board of New Kent County*, 391 U.S. 430, 439.

We further support as legally and factually sound the conclusion of both courts below that the racial and ethnic concentrations in most of the core area schools did not originate with the policies and practices of the school board.[25] However, we share the view of the district court that significant disparities in educational opportunities in a group of schools defined by racial and ethnic concentrations would constitute violations of the equal protection clause. We do not concur with

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grams which have been carried on in these schools have not resulted in any significant improvement and so other methods are indicated" (Pet. App. 91a). There was, however, no mention of these special programs in the court's discussion of the constitutional violation (see Pet. App. 75a–89a).

[25] We believe that with respect to some of those schools a remand is necessary for a determination, based on proper legal standards, of the extent to which school board action may have intentionally segregated them. See, pp. 10–11, *supra*.

the district court's assumption that the only effective remedy for such a violation is to eliminate the racial concentration—and therefore the longstanding neighborhood school policy—by transferring the affected students. It would be equally effective to eliminate the disparities rather than disperse the students.[20] Indeed, such a program could be more specifically tailored to the violation—*i.e.*, the failure to provide an equitable share of resources and to meet special educational needs—and to that extent would be a preferred equitable remedy. We therefore agree with the court of appeals that in this situation the educational program, not the racial concentration, is the legal problem; we do not support that court's view that such a condition is beyond the area where it is appropriate for the federal judiciary to intervene (Pet. App. 145a).

If a violation is found, "the task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann* v. *Board of Education, supra*, 402 U.S. at 16. That balancing process may be difficult to apply where the condition is a denial of equal educational opportunity, since there is widespread disagreement among educational experts as to what the individual and collective interests are. However, while recognizing that there is not

[20] In our view, the record here does not provide sufficient empirical support for the district court's apparent conclusion that the only feasible way to eliminate the disparities "is a system of desegregation and integration which provides compensatory education in an integrated environment" (Pet. App. 112a).

at this time—and may never be—one perfect educational remedy for the offending condition, one should be able to formulate guidelines for fashioning a judicial remedy. Such guidelines should begin with a recognition that equal educational opportunity "is a goal [the nation] does not know how to attain." Mosteller and Moynihan, *supra* note 20, at 45. "What is needed is innovation, experiment, effort, measurement, analysis" (*id.* at 63)."

We submit that the most appropriate remedy for this kind of violation is an educational one and should be developed by the school board in the first instance. Its elements would include: (1) application of resources in an even-handed manner; (2) identifying within the limits of educational expertise the special needs of each school that has either received inferior resources or offered demonstrably inferior educational opportunities; and (3) plans for designing and implementing a remedial program to meet such needs. The record below, compiled as it was with a different perception of the issue, precludes a more precise definition of either the violation or the remedy and in our view calls for a remand for such determinations within guidelines fixed by this Court.

" And see the testimony of plaintiffs' expert witness, Robert O'Reilly (App. 1932a):

> * * * this is a very unsettled field. There are no hard and fast rules to go on. It's very unlikely that anybody is ever going to come up with a treatment that is going to be generally effective with minority students at all. What has to be done is basically many, many years of experimentation in which we slowly and carefully identify and develop specific programs designed for * * * specific minority groups.

CONCLUSION

For the reasons stated above, we believe the decision of the court of appeals should be affirmed in part, reversed in part, and remanded for further proceedings.

Respectfully submitted.

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APPENDIX

Achievement Scores, Median Incomes, and Racial Compositions of Denver Elementary Schools, Listed in Order of Rank of Median Scores on Fifth Grade Paragraph Meaning Achievement Tests

School	5th Grade Par. Meaning Median Percentile[1]	5th Grade Par. Meaning Rank	5th Grade Arith. Comprehension Median Percentile[1]	5th Grade Arith. Comprehension Rank	Median Family Income[2]	Median Family Income Rank	Student Body Racial Composition[3]
Fallis	88	1	96	1	8,000	11	70%+ Anglo.
Carson	83	2	64	11	10,000+	1	70%+ Anglo.
McMeen	82	3	70	8	7,795	20	70%+ Anglo.
Pitts	80	4	74	7	9,100	7	70%+ Anglo.
Bradley	76	5	53	15	7,600	23	70%+ Anglo.
Steven	76	5	82	3	10,000+	1	70%+ Anglo.
Stock	76	5	56	12	10,000+	1	70%+ Anglo.
Ash Grove	75	8	50	19	8,710	10	70%+ Anglo.
University Park	75	8	76	5	8,120	16	70%+ Anglo.
Palmer	74	10	48	23	8,105	17	70%+ Anglo.
Steele	74	10	88	2	6,850	32	70%+ Anglo.
Cory	72	12	70	8	9,500	6	70%+ Anglo.
Sabin	72	12	48	23	8,230	14	70%+ Anglo.
Bromwell	72	12	82	3	6,435	40	70%+ Anglo.
Knight	66	15	53	15	10,000+	1	70%+ Anglo.
Doull	65	16	70	8	8,305	12	70%+ Anglo.
Moore	65	16	76	5	6,820	34	70%+ Anglo.
Washington Park	65	16	56	12	7,790	21	70%+ Anglo.
Ellis	64	19	50	19	8,260	13	70%+ Anglo.
Ellsworth	64	19	53	15	6,435	40	70%+ Anglo.
Asbury	60	21	34	34	6,920	38	70%+ Anglo.
Montbello	58	22	34	34	(?)	(?)	70%+ Anglo.
Park Hill	58	22	31	45	8,070	18	70%+ Anglo.
Traylor	58	22	53	15	(?)	(?)	70%+ Anglo.
Alcott	54	25	34	34	6,400	43	70%+ Anglo.
Montclair	54	25	43	27	8,725	9	70%+ Anglo.
Denison	53	27	34	34	7,710	22	70%+ Anglo.
Schenck	53	27	28	54	6,800	36	70%+ Anglo.
Teller	53	27	40	31	6,600	37	70%+ Anglo.
Whiteman	53	27	64	14	10,000+	1	70%+ Anglo.
Gust	52	31	50	19	6,800	31	70%+ Anglo.
Ashley	48	32	31	45	6,430	42	70%+ Anglo.
Brown	48	32	50	19	6,545	39	Anglo majority.
Edison	48	32	43	27	6,335	44	70%+ Anglo.
Force	48	32	31	45	7,055	25	70%+ Anglo.
Godsman	48	32	48	23	7,015	28	70%+ Anglo.
McKinley	48	32	24	63	6,100	51	70%+ Anglo.
Phillips	48	32	34	34	8,785	8	Anglo majority.
Stevens	48	32	34	34	5,830	59	70%+ Anglo.
Johnson	46	40	24	63	6,850	32	70%+ Anglo.
Rosedale	42	41	[illegible]	54	6,265	46	70%%+ Anglo.
Cheltenham	40	42	43	27	5,110	66	Hispano majority.
Cowell	40	42	31	45	5,870	56	Anglo majority.
Goldrick	40	42	43	27	7,050	26	70%+ Anglo.
Berkeley	38	45	26	60	5,800	58	70%+ Anglo.
Knapp	38	45	11	78	6,250	48	Anglo majority.
Lincoln	38	45	34	34	6,055	53	70%+ Anglo.
Remington	38	45	11	78	6,150	50	Hispano majority.
Schmitt	38	45	37	33	7,015	23	70%+ Anglo.
Valverde	38	45	48	23	7,050	26	Anglo majority.
Barrett[4]	36	51	13	74	6,335	44	Negro majority.
Colfax	36	51	22	66	5,110	66	Anglo majority.
Hallett[4]	36	51	31	45	8,175	15	Negro majority.

Footnotes at end of table.

School	5th Grade Par. Meaning Median Percentile[1]	5th Grade Par. Meaning Rank	5th Grade Arith. Comprehension Median Percentile[1]	5th Grade Arith. Comprehension Rank	Median Family Income[2]	Median Family Income Rank	Student Body Racial Composition[2]
Barnum	36	54	28	54	5,700	61	Anglo majority.
Beach Court	36	54	28	56	6,285	46	Anglo majority.
Belmont	34	54	34	34	5,980	54	70%+Anglo.
Columbian	34	54	13	76	6,250	48	Anglo majority.
Eagleton	34	54	28	54	5,570	56	Hispano majority.
Newlon	34	54	25	61	6,795	38	Anglo majority.
Alameda	32	60	34	50	4,850	77	Anglo majority.
College View	32	60	19	71	6,600	38	70%+ Anglo.
Emerson	32	60	40	33	4,900	72	70%+ Anglo.
Sherman	32	60	31	60	5,915	56	70%+ Anglo.
Smith[4]	32	60	28	54	7,455	26	Negro majority.
Thatcher	32	60	28	45	6,100	51	70%+ Anglo.
Boulevard	30	66	11	76	5,855	65	Hispano majority.
Elmwood[5]	30	66	[illegible]	65	4,820	74	Hispano majority.
Stedman[5]	30	66	22	58	7,930	19	Negro majority.
Elyria[5]	28	69	14	34	4,500	70	Hispano majority.
Munroe	26	70	11	78	4,910	70	Hispano majority.
Smedley[5]	26	70	12	77	5,000	68	Hispano majority.
Wyman	26	70	15	61	4,000	76	Negro-Hispano majority.
Bryant Webster[5]	25	73	10	80	5,000	60	Hispano majority.
Columbine[5]	25	73	22	65	5,500	63	Negro majority.
Swansea	25	73	11	78	5,300	62	Hispano majority.
Evans[6]	24	76	14	34	4,000	66	Negro-Hispano majority.
Gilpin	24	76	14	91	3,600	84	Hispano majority.
Greenlee[5]	24	76	10	86	3,700	83	Hispano majority.
Westwood	24	76	11	78	4,910	70	Hispano majority.
Whittier[5]	24	76	13	84	4,630	75	Negro majority.
Ashland	22	81	22	80	5,430	64	Hispano majority.
Crofton	22	81	14	73	3,650	86	Hispano majority.
Fairmont[5]	22	81	10	86	4,550	78	Hispano majority.
Ebert	18	84	11	78	3,600	84	Hispano majority.
Fairview[5]	18	84	22	86	2,900	87	Hispano majority.
Garden Place	18	84	11	78	4,590	73	Hispano majority.
Harrington[5]	18	84	10	85	5,735	60	Negro majority.
Mitchell[5]	16	88	10	85	3,905	82	Negro majority.
Wyatt	14	88	16	72	4,060	80	Hispano majority.
Boettcher[7]	11	90	8	90	(3)	(3)	70%+ Anglo.

[1] Source: Pl. Ex. 88.
[2] Source: Pl. Ex. 108.
[3] Not available.
[4] Integrated by the District Court's preliminary injunction, in 1969 Barrett became majority Anglo (Def. Ex. S-1).
[5] Court-designated schools.
[6] In 1968 Evans became 56.9% Anglo (Def. Ex. S-1).
[7] Boettcher is a "special education" school (Pl. Ex. 24, p. 41).

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